(3)

No. 06-6330

In The
Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines must be applied as advisory only, and merely as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented.

(1) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary," may a district court consider either the impact of the so-called "100:1 powder/crack weight ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary," how should a district court consider the factors articulated in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table Of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional And Statutory Provisions Involved	1
Statement	2
Summary Of Argument	13
Argument	16
I. District Courts Have The Authority To Independently Assess Whether The 100:1 Powder/Crack Cocaine Ratio Produces An Appropriate Outcome When Sentencing Defendants Pursuant To 18 U.S.C. § 3553(a)	16
A. Both Judicial And Statutory Authority Permit District Courts To Consider Any Information That Is Reliable And Relevant To Sentencing, Even When Such Consideration Results In Disagreement With The Advisory Sentencing Guidelines	17
B. The Fourth Circuit's Blanket Prohibition On Any Consideration Of The Unwarranted Effects Of The 100:1 Ratio Impermissibly Limits The Discretion Of The District Courts	24
1. The Fourth Circuit's *Per Se* Rule Is Based On A Flawed View Of The "Will of Congress"	24

TABLE OF CONTENTS – Continued

Page

2. The Fourth Circuit's *Per Se* Rule Contravenes § 3553(a) By Improperly Elevating The Crack Cocaine Guideline Over The Parsimony Provision And The Statutory Considerations Other Than The Guideline Range, And By Incorrectly Equating Avoidance Of Unwarranted Disparity With Adherence To The Guidelines 27

3. If Allowed To Stand, The Fourth Circuit's *Per Se* Rule Would Unconstitutionally Constrain The District Courts' Discretion In Crack Cocaine Cases In Violation Of *Booker* And The Sixth Amendment 34

4. The Fourth Circuit's *Per Se* Rule Is Inconsistent With The Deference Owed To District Courts' Considered Sentencing Judgments 36

II. The District Court Acted Within Its Discretion In Sentencing Derrick Kimbrough To 180 Months In Prison After Considering The 100:1 Ratio..... 41

A. The District Court Was Within Its Discretion In Considering The Sentencing Commission's Reports Because They Were Both Reliable And Relevant To The Court's Sentencing Decision..... 41

B. The District Court Did Not Abuse Its Discretion In Imposing A Sentence Of 180 Months..... 45

TABLE OF CONTENTS – Continued

Page

Conclusion 47

Appendix 1a

Text, U.S. Const. amend. VI 1a

Text, 18 U.S.C. § 3553(a), (b)(1), and (c) 1a

Text, 18 U.S.C. § 3661 ..... 5a

Text, 21 U.S.C. § 841(a) and (b)(1)(A)-(C) 6a

Text, 21 U.S.C. § 850 ..... 13a

Text, 28 U.S.C. § 991 ..... 13a

Text, 28 U.S.C. § 994 ..... 15a

TABLE OF AUTHORITIES

Page

CASES

Colautti v. Franklin, 439 U.S. 379 (1979) 21

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 30

Cunningham v. California, 127 S. Ct. 856 (2007) 21

Ex parte United States, 242 U.S. 27 (1916) 37

INS v. St. Cyr, 533 U.S. 289 (2001) 36

Jones v. United States, 526 U.S. 227 (1999) 36

Koon v. United States, 518 U.S. 81 (1996) 30, 38

Mistretta v. United States, 488 U.S. 361 (1989) 38, 42

Rita v. United States, 127 S. Ct. 2456 (2007) .....*passim*

Roberts v. United States, 445 U.S. 552 (1980) 19, 20

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 21

United States v. Booker, 543 U.S. 220 (2005) .....*passim*

United States v. Castillo, 460 F.3d 337 (2d Cir. 2006) 24, 32

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) 21

United States v. Eura, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659) .....*passim*

United States v. Grayson, 438 U.S. 41 (1978) 18, 19

United States v. Gunter, 462 F.3d 237 (3d Cir. 2006) 32

United States v. Jointer, 457 F.3d 682 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600) 25, 32

TABLE OF AUTHORITIES – Continued

Page

United States v. Leatch, 482 F.3d 790 (5th Cir. 2007), *petition for cert. filed* June 21, 2007 (U.S. No. 06-12046) 25, 32

United States v. Pho, 433 F.3d 53 (1st Cir. 2006) 24, 32

United States v. Pickett, 475 F.3d 1347 (D.C. Cir. 2007) 28

United States v. Ricks, ___ F.3d ___, 2007 WL 2068098 (3d Cir. 2007) 25, 32

United States v. Spears, 469 F.3d 1166 (8th Cir. 2006), *petition for cert. filed* Mar. 2, 2007 (U.S. No. 06-9864) 25, 32

United States v. Tucker, 404 U.S. 443 (1972) 19

United States v. Williams, 456 F.3d 1353 (11th Cir.), *reh'g denied*, 472 F.3d 835 (11th Cir. 2006) 25

Williams v. New York, 337 U.S. 241 (1949) 18, 37

Williams v. United States, 503 U.S. 193 (1992) 38

Zadvydas v. Davis, 533 U.S. 678 (2001) 36

CONSTITUTIONAL PROVISION

U.S. Const. amend. VI ..... *passim*

STATUTORY AND LEGISLATIVE MATERIALS

18 U.S.C. § 924 45

18 U.S.C. § 3231 1

18 U.S.C. § 3551 ..... 4, 28

18 U.S.C. § 3553 ..... *passim*

18 U.S.C. § 3577 (1976 ed.) 18, 19

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3661 ..... *passim*

18 U.S.C. § 3742 ..... *passim*

21 U.S.C. § 841 ..... 3, 25, 27, 45

21 U.S.C. § 850 ..... *passim*

28 U.S.C. § 991 ..... 5, 42

28 U.S.C. § 994 ..... 5, 8, 42

28 U.S.C. § 995 42

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) 3, 6, 25

Pub. L. No. 91-452, 84 Stat. 951 (1970) 18

Pub. L. No. 91-513, 84 Stat. 1269 (1970) 19

Pub. L. No. 104-38, 109 Stat. 334 (1995) 8, 26

Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1987 ..... *passim*

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 7

S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220 *et seq.* 3, 4, 5, 37

H.R. Rep. No. 104-272 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335 26

TABLE OF AUTHORITIES – Continued

Page

RULE

Fed. R. Evid. 1101 19

U.S. SENTENCING GUIDELINES AND SENTENCING COMMISSION MATERIALS

U.S.S.G. Ch. 1, Pt. A (Nov. 2002 ed.) 34

U.S.S.G. § 2D1.1 ..... 6, 33, 43

U.S.S.G. § 5H1.2, p.s. 11

U.S.S.G. § 5H1.5, p.s. 11

U.S.S.G. § 5H1.6, p.s. 11

U.S.S.G. § 5H1.11, p.s. 11

U.S.S.G. App. C 26

U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* (Nov. 2004) ("Fifteen Year Report"), *available at* http://www.ussc.gov/15_year/15year.htm 6, 26

U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002) ("2002 Report"), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm 3, 8, 43, 44

U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007) ("2007 Report"), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf 25, 33

TABLE OF AUTHORITIES – Continued

Page

U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) ("1995 Report"), *available at* http://www.ussc.gov/crack/exec.htm 3, 7, 44

U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 1997) ("1997 Report"), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF 7, 8

U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines for United States Courts*, 60 Fed. Reg. 25,074 (1995) 7

U.S. Sentencing Comm'n, *Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2007*, 72 Fed. Reg. 28,558 (2007) 27

OTHER SOURCES

Brief of Senators Edward M. Kennedy, Orrin G. Hatch, & Dianne Feinstein as *Amici Curiae* in Support of Respondent, *Claiborne v. United States*, No. 06-5618 31

Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner, *Gall v. United States*, No. 06-7949 4

Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker: *More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. 425 (2006) 31, 34

Transcript of Oral Argument, *Cunningham v. California*, 127 S. Ct. 856 (2007) 21

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* (Mar. 2002), *available at* http://www.usdoj.gov/olp/pdf/crack_powder2002.pdf..... 8

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit appears at pages 96 to 98 of the Joint Appendix ("J.A."). The unpublished transcript of the sentencing hearing appears at pages 55 to 77 of the Joint Appendix.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction over the United States's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The court of appeals issued its opinion and judgment on May 9, 2006. J.A. 96. It denied Mr. Kimbrough's petition for rehearing on June 6, 2006. J.A. 100. Mr. Kimbrough filed his petition for a writ of certiorari on September 5, 2006, which this Court granted on June 11, 2007. J.A. 101. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

1. Derrick Kimbrough pled guilty in federal court to three drug offenses involving both powder cocaine and crack cocaine and to a firearm offense. The charges stemmed from his arrest by Norfolk, Virginia, police officers; the Commonwealth later dismissed the case in favor of federal prosecution. J.A. 30-33; Sealed J.A. 115. Two of the federal drug offenses set the punishment range at ten years to life imprisonment; the firearm charge carried a range of five years to life, to be served consecutively to the sentences on the drug offenses.

2. The imprisonment range recommended by the U.S. Sentencing Guidelines for the drug offenses was 168 to 210 months. This range was substantially higher than it would have been if the offenses had involved only powder cocaine because the Guidelines treat one gram of crack cocaine as equivalent to 100 grams of powder cocaine. Observing that after *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines are but one consideration in sentencing, the district court imposed the statutory mandatory minimum terms for both the drug and firearm offenses, for a total of fifteen years' imprisonment. The court identified several reasons for the sentence, including Mr. Kimbrough's minor criminal history, his military service, his steady work history, the "exaggerat[ion]" of the seriousness of the offense by the 100:1 powder/crack cocaine weight ratio used in the Guidelines, and the statutory principle of parsimony.

3. The sentence that the district court imposed was within the statutory limits, which required a sentence of no fewer than ten years of imprisonment on two of the counts of conviction because of the amount of crack cocaine

involved. That lower limit was established by Congress in the Anti-Drug Abuse Act of 1986. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986) (hereafter "ADAA"); *see generally* U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 116-23 (Feb. 1995) (hereafter "1995 Report"); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 4-11 (May 2002) (hereafter "2002 Report"). The ADAA instituted mandatory minimum sentences for drug offenses based both on drug type and drug quantity. *See* 1995 Report at 114-16. The ADAA's mandatory minimum statutes marked the first appearance of the 100:1 powder/crack ratio, which requires 100 times as much powder cocaine than crack cocaine to trigger a mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A), (B). Why Congress selected that particular ratio is unclear. *See* 2002 Report at 7-8; 1995 Report at 117.

4. Within the statutory limits, the district court's sentencing discretion was also guided by the Sentencing Reform Act of 1984, as modified by this Court in *Booker*. *See* Sentencing Reform Act of 1984 (hereafter "the SRA" or "the Act"), Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1987; *Booker*, 543 U.S. at 245 (excising 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e)). Congress enacted the SRA to bring greater certainty and fairness to the federal sentencing system. *See* S. Rep. No. 98-225, at 39, 59, 65 (1983) (reporting on S. 1762, 98th Cong. (1983)), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220 *et seq.*; *Booker*, 543 U.S. at 264. Congress sought to reduce "[s]entencing disparities that are not justified by differences among offenses or offenders," including "sentence[s] that [are] unjustifiably high compared to sentences for similarly situated offenders" and "sentence[s] that [are] unjustifiably low."

S. Rep. No. 98-225, at 45-46; *see Booker*, 543 U.S. at 264. To this end, the SRA took a two-prong approach, in which it cabined, but did not eliminate, the traditional sentencing discretion of federal courts. S. Rep. No. 98-225, at 51-52.

5. First, Congress provided a statutory framework to guide district courts as to the specific goal of sentencing and the appropriate considerations for reaching that goal. The framework is codified at 18 U.S.C. § 3553(a), which instructs the sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection."[1] The purposes set out are broad and include the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A); *see also* 18 U.S.C. § 3551(a) (defendants to be sentenced "so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case"). To ensure that these purposes are fulfilled in each case, Congress directed sentencing courts to consider a number of specific factors, including the nature and circumstances of the offense, the history and characteristics of the defendant, the sentencing guideline range, and the need to avoid unwarranted sentence disparities. 18 U.S.C. § 3553(a)(1), (3)-(7). Section 3553(a)

[1] This language reflects the principle of parsimony and will be referred to in this brief as the "parsimony provision." One of the *amici curiae* in *Gall v. United States*, No. 06-7949, discusses the parsimony provision at length. *See* Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner, Part I.

does not direct a sentencing court to elevate any one factor over any other.

Second, Congress created the U.S. Sentencing Commission, charging it with "establish[ing] sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)." 28 U.S.C. § 991(b). Congress directed the Commission, in establishing "categories of offenses" for use in the Guidelines, to consider a number of factors, including "the nature and degree of harm caused by the offense," "the community view of the gravity of the offense," "the public concern generated by the offense," "the deterrent effect a particular sentence may have on the commission of the offense by others," and "the current incidence of the offense in the community and in the Nation as a whole." 28 U.S.C. § 994(c). Congress required the Commission to make sentencing ranges "consistent with all pertinent provisions" of Title 18, including the purposes of sentencing set forth in § 3553(a)(2). *See* 28 U.S.C. § 994(b)(1); S. Rep. No. 98-225, at 168.

The Sentencing Reform Act and the Guidelines were not intended to eliminate judicial discretion in sentencing. S. Rep. No. 98-225, at 51. In other words, the Guidelines were not to "be imposed in a mechanistic fashion" that would "eliminate the thoughtful imposition of individualized sentences." *Id.* at 52. And the thoughtful imposition of sentence by the district court was not, despite the provision for appellate review, to be "displaced by the discretion of an appellate court." *Id.* at 150.

6. As the SRA intended, the district court's sentencing decision in this case was also informed by the

guideline applicable to drug offenses. At the time that Congress set statutory limits for cocaine offenses using the 100:1 ratio, the Sentencing Commission was formulating its initial set of guidelines. Congress had not included any directive in the ADAA to implement the ratio in the Guidelines. Likewise, Congress had not amended any portion of the SRA to reflect or require the 100:1 ratio. In setting offense levels for drug offenses, however, the Commission used an ADAA-like type-and-quantity approach, linking base offense levels to the quantities of each drug that triggered the mandatory minimums. Additional base offense levels above, between, and below those minimums were based on extrapolation of drug quantities. *See* U.S.S.G. § 2D1.1(c) (drug quantity table).[2] For cocaine offenses, the Commission's decision had the effect of incorporating the statutory 100:1 ratio into the Guidelines.

7. By the early 1990s, many questions had arisen about the soundness of the 100:1 ratio. In September 1994, Congress directed the Commission to "address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such

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[2] The Commission did not explain "why [it] extended the ADAA's quantity-based approach . . . across 17 different levels falling below, between, and above the two amounts specified in the statutes," which is "unfortunate for historians, because no other decision of the Commission has had such a profound impact," "increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 48, 49 (Nov. 2004) (hereafter "Fifteen Year Report").

differences in penalty levels." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, § 280006, 108 Stat. 1796, 1985, 2097.

The Commission responded six months later, concluding that "the present 100-to-1 quantity ratio is too great." 1995 Report at i. The Commission observed that, "[a]mong other problems, the 100-to-1 quantity ratio creates anomalous results by potentially punishing low-level (retail) crack dealers far more severely than their high-level (wholesale) suppliers of the powder cocaine that served as the product for conversion into crack." *Id.* Acknowledging that its own choice, not congressional will, had injected the ratio into the Guidelines, the Commission concluded that "[t]he guidelines should be refined to address better those harms that prompted Congress to establish the 100-to-1 quantity ratio." *Id.*

The Commission sent to Congress a proposed amendment, one that would have changed the quantities of crack cocaine in the Guidelines' drug quantity table to match the quantities of powder cocaine. *See* U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines for United States Courts*, 60 Fed. Reg. 25,074, 25,075-77 (1995) (amendment 5); U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 1 (April 1997) (hereafter "1997 Report"). Based upon its "consideration of the factors in the Special Report to Congress and the purposes of sentencing set forth in 18 U.S.C. [§] 3553," the Commission concluded that "the guideline provisions, as amended, will better take into account the increased harms associated with some crack cocaine offenses and, thus, the different offense levels based solely on the form of cocaine are not required." 60 Fed. Reg. at 25,077.

At the behest of the Department of Justice, Congress exercised its authority pursuant to 28 U.S.C. § 994(p) to reject the Commission's proposed amendment. *See* Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995) (rejecting crack amendment and money laundering amendment); U.S. Dep't of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 17 (Mar. 2002). Congress did not, however, direct the Commission to retain the 100:1 ratio. Instead, it told the Commission to try again, and asked for proposals revising the powder/crack ratio "in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth" in 18 U.S.C. § 3553(a). Pub. L. No. 104-38, § 2(a).

8. Twice more, the Sentencing Commission issued reports critical of the 100:1 ratio it had implemented. *See generally* 1997 Report; 2002 Report. The 2002 Report included new research recounting the recent literature and the results from the Commission's own extensive empirical study of federal cocaine offenses and offenders. *See* 2002 Report at v, 4. The Commission used the new information to evaluate the 100:1 ratio in light of the general and specific objectives set out in 18 U.S.C. § 3553(a). *Id.* As before, the Commission "*unanimously* and *firmly* conclude[d] that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio." *Id.* at viii-ix (emphasis added). Congress passed no further legislation on the subject in response to either report, but neither did it ever require that the 100:1 ratio be retained.

9. It was against this backdrop that the district court relied upon the information in the Sentencing Commission's 2002 Report as part of its rationale for imposing a sentence lower than the guideline range

suggested for Mr. Kimbrough's case. The record demonstrates that, in selecting the sentence, the court accounted for both the rules that bound it and the discretion afforded to it by Congress and this Court.

After ruling on Mr. Kimbrough's objections to the guideline calculations of the presentence report, the court found that "the guideline range with respect to these counts indicate[s] that the guideline sentencing range is 168 to 210, plus 60 months consecutive." J.A. 61-63, 66-68. Thus, the total range, including the consecutive 60 months, was 228 to 270 months, or 19 to 22.5 years.

Regarding the specific sentence to impose, the prosecutor asked that "the Court adopt the recommendations of the guidelines [because] they take in many factors, including many of the factors in section 3553, which the Court also has to consider." J.A. 69. When asked by the court if the government thought that "[a]nywhere from 19 and 22 years" was "an appropriate sentence," the prosecutor answered, "I think it's a reasonable sentence, Your Honor." *Id.*

Defense counsel sought a lower sentence. Noting the disparity in sentencing between crack and powder cocaine, counsel observed that Mr. Kimbrough "had actually more powder cocaine than he had crack cocaine in his possession." J.A. 70. Counsel cited the Sentencing Commission's findings that "the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity most impacts minorities." *Id.* Counsel explained how those

findings related to the factors that the court was required by 18 U.S.C. § 3553(a) to consider in arriving at a sentence, in particular the need for the sentence to avoid unwarranted disparity, promote respect for the law, and impose a just punishment. *Id.* Additionally, counsel asked the court to consider Mr. Kimbrough's lack of prior felony convictions, his steady work history, the fact that the case resulted from a state, not federal, drug interdiction, and the fact that Mr. Kimbrough voluntarily submitted himself to a minimum 180-month sentence by pleading guilty as charged. *Id.* at 70-71.

At no point before or during the sentencing hearing did the prosecutor argue that the court could not consider the 100:1 ratio. At no point did the prosecutor argue that the Sentencing Commission's reports were not relevant or reliable. At no point did the prosecutor respond to any other of defense counsel's points about an appropriate sentence. *See* J.A. 41-47, 69.

10. Before imposing the sentence, the district court explained its decision:

> The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective way.

J.A. 72. The court recognized that it was "required to consider factors other than what the sentencing guidelines recommend because the sentencing guidelines constitute only one factor. The sentencing guidelines as calculated

exclude[] consideration of a number of factors that [§] 3553(a) tells the Court that the Court should consider" – things such as the history and characteristics of the defendant, his educational and vocational skills, his family ties and background, and his military record[3] – "[y]et the sentencing factors other than the guidelines say[] the Court should consider those."[4] J.A. 73.

The court noted that "[o]ne thing the statute tells the Court to do . . . is not to impose a sentence that is greater than necessary to accomplish the factors I just outlined." J.A. 72. The court then found "that to impose a sentence of 19 to 22 years in this case is ridiculous" because "[i]t imposes more punishment, given the record here, than is necessary to accomplish what needs to be done." *Id.* The court made a detailed explanation of this finding.

First, the court recognized that while the offenses involved both powder cocaine and crack cocaine, the latter "dr[ove] the offense level to a point higher than is necessary to do justice in this case." J.A. 72. The court specifically relied upon the fact that "the Sentencing Commission [has] recognize[d] that crack cocaine has not caused the damage that the Justice Department alleges it has" and on its recognition of "the disproportionate and unjust effect that crack cocaine guidelines have in sentencing." *Id.* The court also considered Mr.

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[3] *See* U.S.S.G. §§ 5H1.2, p.s., 5H1.5, p.s., 5H1.6, p.s., 5H1.11, p.s.

[4] *See* 18 U.S.C. § 3553(a)(1) (a sentencing court "shall consider . . . the history and characteristics of the defendant"); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); 21 U.S.C. § 850 (same).

Kimbrough's history and background, such as the fact that while Mr. Kimbrough had a criminal record, "it's a record involving misdemeanors, and as counsel points out, until this case, he has not had a felony conviction." *Id.* at 73. Further, the court considered "that this defendant at one time served in combat in Desert Storm and honored his country and received an honorable discharge, and that for [the] most part since he was honorably discharged, the defendant has been a construction worker and has found meaningful employment." *Id.* at 74.

Finally, returning to the fact that the offense involved both crack and powder cocaine, the court noted "that the crack cocaine involved in this case does in fact exaggerate the advisory sentencing guideline" range and that "should [the court] follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." J.A. 74. Accordingly, "[g]iven all of those factors and the [c]ourt's need to avoid imposing an unwarranted disproportionate sentence," the court sentenced Mr. Kimbrough to 120 months on each of the drug convictions and to 60 months on the firearm conviction, for a total of 180 months, "which is clearly long enough under the circumstances." *Id.* When the government noted its general objection to the court's choice of sentence "as being unreasonable," the court responded, "Going outside the guidelines? This is post-*Booker*. The Guidelines are advisory. Any sentence outside the advisory guidelines [is] not automatically unreasonable." *Id.* at 76-77.

11. On appeal by the government, the United States Court of Appeals for the Fourth Circuit found the sentence unreasonable *per se*. J.A. 98. The Fourth Circuit did not

consider the numerous circumstances articulated by the district court. Rather, it simply stated that "[a]ccording to our recent decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guideline range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." *Id.* at 98. The court vacated Mr. Kimbrough's sentence and remanded the case for resentencing. *Id.* at 98, 99.

SUMMARY OF ARGUMENT

Federal district courts have broad authority to consider information when exercising their discretion in sentencing defendants pursuant to 18 U.S.C. § 3553(a). A court cannot exercise its discretion, however, if it is forbidden by a court of appeals from considering reliable information relevant to sentencing. This case asks whether § 3553(a) can be read to bar a district court from considering a variety of factors, including its disagreement with the Sentencing Guidelines, in imposing a sentence. The answer is "no." The statute's plain language strongly supports the district court's exercise of discretion both in considering information and in selecting a sentence.

The district court in Mr. Kimbrough's case considered research and recommendations published in a series of reports by the U.S. Sentencing Commission – the agency entrusted by Congress with developing and implementing sentencing policy – demonstrating that the 100:1 powder/crack cocaine ratio used in the drug guideline was unfair and resulted in sentences greater than necessary to meet the objectives of § 3553(a). The court used both this

information and other case-specific information to consider the statutory purposes and factors relevant to the case. After doing so, the court imposed a sentence that it concluded met the requirements of § 3553(a) even though it fell below the range recommended by the now-advisory Guidelines. The Fourth Circuit rejected the district court's approach, holding that the sentence was *per se* unreasonable because the lower court relied in part upon the Sentencing Commission's reports to conclude that a non-guideline sentence was appropriate. That rejection cannot be sustained.

This Court's long-standing precedents and the sentencing scheme enacted by Congress impose no categorical bar on the types of information that may be considered by a district court in imposing a sentence. On the contrary, three separate statutes, 18 U.S.C. § 3553(a), 18 U.S.C. § 3661, and 21 U.S.C. § 850, authorize district courts to consider all relevant information; the last specifically applies to drug cases such as Mr. Kimbrough's. The Fourth Circuit's ban on such information in the context of crack cocaine cases cannot be upheld because it contravenes this authority. For this reason alone, the Fourth Circuit's judgment must be reversed.

The Fourth Circuit's *per se* rule improperly limits sentencing courts' discretion in additional ways. First, the ruling is based on the court of appeals's erroneous view of the "will of Congress" in regard to the 100:1 ratio. The only controlling congressional "will" is that expressed in the statutory mandatory minimums and maximums that the legislature has enacted for drug offenses. The district court did not disobey congressional will in that regard. Moreover, the court of appeals was wrong in believing that Congress required use of the 100:1 ratio in the Sentencing

Guidelines. Indeed, the evidence is to the contrary: Congress has never directed the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines, and it has in fact acknowledged that the ratio is problematic.

Next, the Fourth Circuit's prohibition on disagreement with the crack cocaine guideline has effectively made that guideline mandatory again. Subject only to the overarching command to impose a sentence no greater than necessary to meet the purposes of sentencing, § 3553(a) places all of its specified considerations on an even footing. But the Fourth Circuit has elevated consideration of the advisory guideline range (subsection (a)(4)) and an incorrect conception of what it means to avoid unwarranted disparity (subsection (a)(6)) over the other considerations in § 3553(a) and, indeed, over even the parsimony provision. Nothing in § 3553(a) permits such an elevation of these factors. Moreover, contrary to the Fourth Circuit's view, a construction of § 3553(a) that places subsections (a)(1)-(7) on an equal footing will not lead to *unwarranted* disparity.

If allowed to stand, the Fourth Circuit's *per se* rule would violate the Sixth Amendment because it impermissibly restricts district courts' discretion in crack cocaine cases. As this Court ruled in *Booker*, either the Sentencing Guidelines are advisory or they are unconstitutional. The court of appeals's rule is so strict that the court believed itself constrained to reverse Mr. Kimbrough's sentence even though it was based only in part on the district court's disagreement with the crack cocaine guideline. This Court can avoid the constitutional problem, however, by reiterating that the Sentencing Guidelines are not simply "effectively advisory," but are in fact "truly advisory," and by placing the sentencing range

suggested by the Guidelines on an even footing with the other considerations of § 3553(a).

Finally, the Fourth Circuit's rule of *per se* reversal is insufficiently deferential to district courts. The long tradition of appellate deference to sentencing courts' decisions was not eliminated by the Sentencing Reform Act; rather, as this Court has recognized, it continued even while the Sentencing Guidelines were mandatory. Appellate deference has acquired new significance now that § 3553(a), and not the Guidelines, governs sentencing courts' decisions. The Fourth Circuit thus should have deferred to the district court's considered judgment of the appropriate sentence in this case. The appellate court's failure to do so must be reversed.

ARGUMENT

I. DISTRICT COURTS HAVE THE AUTHORITY TO INDEPENDENTLY ASSESS WHETHER THE 100:1 POWDER/CRACK COCAINE RATIO PRODUCES AN APPROPRIATE OUTCOME WHEN SENTENCING DEFENDANTS PURSUANT TO 18 U.S.C. § 3553(a).

A cornerstone of federal criminal law is that district courts may consider a broad range of information for the purpose of imposing sentence. This practice reflects the unremarkable proposition that the craft of fashioning just and proportionate sentences benefits from consideration of relevant information. In Mr. Kimbrough's case, the district court based its sentence, in part, on its assessment that the 100:1 powder/crack cocaine ratio used by the U.S. Sentencing Guidelines resulted in a sentence greater than

necessary to achieve the goals set out by Congress in 18 U.S.C. § 3553(a). That assessment is strongly supported by a series of reports from the Sentencing Commission itself. The Fourth Circuit, however, held that disagreement with the 100:1 ratio was *per se* unreasonable. The court of appeals was wrong.

The plain texts of 18 U.S.C. § 3553(a) and § 3661 and 21 U.S.C. § 850 establish that the district court correctly considered the Sentencing Commission's reports in fashioning a just sentence. The 100:1 ratio was not placed in the Guidelines by Congress; it was incorporated by the Sentencing Commission. Thus, under this Court's precedent, the sentencing court was free to consider the problems engendered by the ratio, as well as other relevant information, in selecting a sentence that would meet the requirement that Congress *did* impose – that a sentence be sufficient but not greater than necessary to fulfill the purposes of § 3553(a). Because the Fourth Circuit's *per se* rule barring consideration of the 100:1 ratio was contrary to statute and precedent and because the rule would make the crack cocaine guideline mandatory in violation of the Sixth Amendment in many cases, the judgment of the court below should be reversed.

A. Both Judicial And Statutory Authority Permit District Courts To Consider Any Information That Is Reliable And Relevant To Sentencing, Even When Such Consideration Results In Disagreement With The Advisory Sentencing Guidelines.

In imposing Mr. Kimbrough's sentence, the district court took into account information establishing that the crack cocaine guideline is unnecessarily harsh and is an

imprecise tool for targeting serious drug offenses. That information came from the Sentencing Commission itself. The Fourth Circuit's rejection of the district court's sentence wrongly prohibits lower courts from considering such information. Both this Court and Congress have consistently stated that there are virtually no limits on the kinds of reliable information a sentencing court may consider.

1. In *Williams v. New York*, 337 U.S. 241 (1949), this Court observed that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. The Court reaffirmed sentencing courts' "age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence," noting that the value of this practice had only been confirmed by the advance of "modern concepts individualizing punishment." *Id.* at 247, 250-51.

In 1970, Congress codified this "fundamental sentencing principle" by enacting 18 U.S.C. § 3577, which provided that "'[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'" *United States v. Grayson*, 438 U.S. 41, 50 (1978) (quoting 18 U.S.C. § 3577 (1976 ed.)); *see* Pub. L. No. 91-452, Title X, § 1001(a), 84 Stat. 951 (1970). Under § 3577, a sentencing judge could conduct an inquiry that was "'largely

unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Grayson*, 438 U.S. at 50 (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)); *see Roberts v. United States*, 445 U.S. 552, 556 (1980) (reiterating principle).

Shortly after enacting § 3577, Congress enacted a parallel provision in the Controlled Substances Act, 21 U.S.C. § 850. Pub. L. No. 91-513, Title II, § 410, 84 Stat. 1269 (1970). Both statutes use the term "information" rather than "evidence." This word choice, when combined with the inapplicability of the Federal Rules of Evidence to sentencing, *see* Fed. R. Evid. 1101(d)(3), emphasizes the breadth of material that district courts can consider, subject only to its relevance to the sentencing at hand and a due process test of reliability.

Although the Sentencing Reform Act thoroughly overhauled federal sentencing, it left the substance of § 3577 untouched except to recodify it at 18 U.S.C. § 3661. Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837, 1987. In contrast, another provision of the SRA, 18 U.S.C. § 3553(b)(1), did limit the information that district courts could consider in one situation: deciding whether to depart from the guideline range.

Under § 3553(b)(1), courts were permitted to consider only the Sentencing Guidelines, policy statements, and official commentary of the Commission. 18 U.S.C. § 3553(b)(1) (Supp. 2004). But this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), excised § 3553(b)(1) to make the SRA comply with the Sixth Amendment. *Id.* at 245. As a result of that excision, the "fundamental sentencing principle," *Grayson*, 438 U.S. at 50, under which sentencing courts enjoy broad discretion

to consult various sources and types of reliable and relevant information, has returned to its plenary, pre-Guidelines state. Accordingly, as long as district courts do not go above the applicable statutory maximum or below any mandatory minimum sentence, the sentencing scheme created by Congress leaves the courts free to consider any reliable information that is relevant to their selection of appropriate sentences.

2. While Congress has not placed limits on the kinds of relevant information district courts may consider in sentencing defendants, it has required the consideration of a variety of enumerated sentencing purposes and other factors in 18 U.S.C. § 3553(a). This mandate obligates district courts to consider not only information specific to the offense and the offender, but also information that places the case-specific facts in context with regard to the purposes of sentencing. This information cannot be limited to the bare facts of an individual case.

For example, § 3553(a)(1) requires the court to consider the "nature" of the offense, not just its "circumstances." An offense's "nature" is not a particularized consideration; it is a generic one. *Cf. Roberts*, 445 U.S. at 555 (noting that government's sentencing memorandum "emphasized the tragic social consequences of the heroin trade"). Likewise, § 3553(a)(2) directs that a sentence must "reflect the seriousness of the offense, [] promote respect for the law, and [] provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). These are broad societal goals that encompass both facts that are specific to a defendant's case and more general information, such as empirical studies of the effectiveness of different types of punishments for certain offenses and offenders. Similarly, the directive that the sentence

"afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(B), requires consideration of information beyond the specific case, including information that may relate solely to the community at large. *Cf.* Transcript of Oral Argument 9-10 (Breyer, J.), *Cunningham v. California*, 127 S. Ct. 856 (2007) (observing that a judge might consider a high frequency of breaking-and-entering crimes in the community as a basis for increasing a defendant's sentence to promote general deterrence). To deny district courts the ability to consider information that is directly relevant to these required purposes is to effectively read the language out of the sentencing statute. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

3. This Court's recent sentencing cases underscore these principles. After *Booker*, a sentencing court *must* impose a sentence that is sufficient but not greater than necessary to effectuate the statutory purposes of sentencing after considering the purposes and factors set forth in § 3553(a). A sentencing court must both "consider Guidelines ranges" and "tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-46. In other words, the Sentencing Reform Act now requires district courts "to take account of the Guidelines together with other sentencing goals" set forth in § 3553(a). *Id.* at 249. "[W]ith the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance." *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

Rita v. United States, 127 S. Ct. 2456 (2007), provides further support that sentencing courts may consider a wide array of information. In *Rita*, the Court clarified that

sentencing judges are permitted to disagree with the appropriateness of sentences produced by the Sentencing Guidelines, even when that disagreement might be characterized as grounded in policy considerations. As the Court explained, after a district court determines the advisory guideline range, it "may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply," or "perhaps because the Guidelines sentence *itself* fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." 127 S. Ct. at 2465 (emphasis added). Further, a party may "*contest*[ ] the Guidelines sentence *generally* under § 3553(a) – that is, [she may] argu[e] that the Guidelines reflect an unsound judgment." *Id.* at 2468 (emphasis added). *Rita* thus establishes that a sentencing court may evaluate the soundness of the judgments of the Sentencing Commission as embodied in the Guidelines, and must do so in response to nonfrivolous arguments by either party. *Id.*

The general authority to disagree with guideline assessments has particular relevance in crack cocaine cases. The Commission itself has stated that it no longer believes the 100:1 guideline ratio furthers the purposes of sentencing. It would be a strange rule that allows sentencing courts to evaluate Commission judgments in the Guidelines, but prohibits them from taking into consideration the Commission's public and persistent declaration that the 100:1 ratio is flawed. In other words, this Court has already effectively rejected the Fourth Circuit's conclusion that disagreement with the Guidelines

is an "impermissible factor." *See United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). The Fourth Circuit's *per se* ban on disagreement with the 100:1 ratio therefore must fail.[5]

In short, Congress and this Court have made plain that sentencing courts are free to consider not just the Guidelines, but all reliable information that is relevant to the imposition of sentences, whether specific to the defendant or general to an offense. The district court in Mr. Kimbrough's case therefore properly considered the

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[5] Further, district courts' consideration of the Commission's reports on the 100:1 ratio in crack cocaine cases is particularly appropriate in light of this Court's rationale for upholding an appellate presumption of reasonableness of a sentence, based upon the "double reliability" of such a sentence. In *Rita*, the Court explained that an appellate presumption is appropriate because "[a]n individual judge who imposes a sentence within the range recommended by the Guidelines . . . makes a decision that is fully consistent with the Commission's judgment in general." 127 S. Ct. at 2465. Put another way, the presumption of reasonableness "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.*

This case presents the analogous situation. The Commission's multiple reports have reached the same conclusion over the past twelve years: that crack cocaine offenses are punished more severely than necessary to meet the purposes of § 3553(a)(2) and do not avoid unwarranted sentence disparities among defendants found guilty of similar conduct. The district court in this case did no more than agree with the Sentencing Commission's well-founded conclusions while remaining within the punishment parameters set by Congress. If a sentence imposed within the guideline range may be presumed reasonable because it accords with the Sentencing Commission's often-unexplained judgment, then a non-guideline sentence that accords with extensively explained findings by the Commission should be deemed at least as reasonable.

Sentencing Commission's reports and recommendations, and the Fourth Circuit erred in concluding otherwise.

B. The Fourth Circuit's Blanket Prohibition On Any Consideration Of The Unwarranted Effects Of The 100:1 Ratio Impermissibly Limits The Discretion Of The District Courts.

The Fourth Circuit's ruling must be reversed because it misapprehends Congress's will with regard to the 100:1 ratio in particular and the federal sentencing scheme in general. If allowed to stand, the appellate court's *per se* rule would place limits on district courts' sentencing discretion that contravene the Sixth Amendment. This Court should therefore reverse the court of appeals's decision and reaffirm the long-standing tradition of appellate deference to the considered judgments of sentencing courts.

1. The Fourth Circuit's *Per Se* Rule Is Based On A Flawed View Of The "Will of Congress."

The Fourth Circuit's *per se* limitation on district courts' discretion in crack cocaine cases hinges on its erroneous belief that the "will of Congress" requires the continued application of the 100:1 ratio in the Sentencing Guidelines. *Eura*, 440 F.3d at 634.[6] The court of appeals

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[6] The other circuits that prohibit district courts from disagreeing with the sentences resulting from the Guidelines' application of the 100:1 ratio likewise base their rulings, in part or *in toto*, on a misperception of congressional will. *See United States v. Pho*, 433 F.3d 53, 62 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 357 (2d

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has taken this view notwithstanding the Guidelines' status as advisory after *Booker* and the Sentencing Commission's repeated acknowledgments that the ratio does not comport with the considerations spelled out in 18 U.S.C. § 3553(a). *See* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 6-8 (May 2007) (hereafter "2007 Report"). The Fourth Circuit's position is incorrect.

The only "will" Congress has expressed as to the 100:1 ratio in crack cocaine cases is that district courts must not sentence below the applicable mandatory minimum terms of imprisonment. Congress has clearly indicated that, for *statutory* purposes, the punishment for offenses involving 50 or more grams of crack cocaine is to be equal to that for offenses involving 5,000 grams of powder cocaine. *See* 21 U.S.C. § 841(b)(1)(A), (B). Congress did not direct the Sentencing Commission to use that ratio when creating the Sentencing Guidelines generally or the drug quantity table in particular. *See* ADAA, Pub. L. No. 99-570, 100 Stat. 3207, 3207-2–3207-5 (1986).

Nor has Congress directed the Sentencing Commission to *retain* the 100:1 ratio in the Sentencing Guidelines, although it has directed the Commission to

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Cir. 2006); *United States v. Ricks*, ___ F.3d ___, 2007 WL 2068098, at *4 (3d Cir. 2007); *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007), *petition for cert. filed* June 21, 2007 (U.S. No. 06-12046); *United States v. Jointer*, 457 F.3d 682, 686 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600); *United States v. Spears*, 469 F.3d 1166, 1177-78 (8th Cir. 2006), *petition for cert. filed* Mar. 2, 2007 (U.S. No. 06-9864); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir.), *reh'g denied*, 472 F.3d 835 (11th Cir. 2006).

revise sentencing for other types of drugs in specific ways.[7] To the extent Congress has expressed its views on the 100:1 *guideline* ratio, it has authorized consideration of alternative approaches. Even when, in 1995, Congress rejected the Commission's proposal to equalize crack and powder cocaine in the drug quantity table, it specifically ordered the Commission to further consider the issue. Pub. L. No. 104-38, § 2, 109 Stat. 334 (1995) (directing Commission to recommend changes to statutes and Sentencing Guidelines governing cocaine offenses and to propose a ratio "consistent with the ratios set for other drugs and consistent with the objectives set forth in" 18 U.S.C. § 3553(a)); *see* H.R. Rep. No. 104-272, at 4 (1995) (acknowledging that "[w]hile the evidence clearly indicates that there are significant distinctions between crack and powder cocaine that warrant maintaining longer sentences for crack-related offenses, it should be noted that the current 100-to-1 quantity ratio may not be the appropriate ratio"), *reprinted in* 1995 U.S.C.C.A.N. 335, 337.

In light of Congress's actions, the Fourth Circuit was wrong in concluding that Congress intended, let alone decreed, that the treatment of crack cocaine in the Sentencing Guidelines must mirror its treatment in the mandatory minimum statute.[8] All that can be said is that

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[7] *E.g.*, U.S.S.G. App. C, amend. 609 (implementing directive to increase penalties for ecstasy offenses); U.S.S.G. App. C, amend. 610 (implementing congressional directive to increase penalties for amphetamine offenses); U.S.S.G. App. C, amend. 667 (implementing directive to increase penalties for gammahydroxybutyric acid offenses); U.S.S.G. App. C, amends. 681, 688 (implementing directive to increase penalties for offenses involving anabolic steroids); *see generally* Fifteen Year Report, App. B (listing congressional directives to Commission).

[8] In fact, the Sentencing Commission has recently demonstrated that it is possible for the drug offense guidelines to respect the

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Congress intended for a defendant convicted of certain crack cocaine offenses to be sentenced to no fewer than ten years in prison. The district court complied with this directive in Mr. Kimbrough's case.

2. The Fourth Circuit's *Per Se* Rule Contravenes § 3553(a) By Improperly Elevating The Crack Cocaine Guideline Over The Parsimony Provision And The Statutory Considerations Other Than The Guideline Range, And By Incorrectly Equating Avoidance Of Unwarranted Disparity With Adherence To The Guidelines.

Even if Congress *had* directed the Guidelines to reflect the 100:1 ratio, the Fourth Circuit erred by holding that disagreement with the crack cocaine guideline is *per se* unreasonable. Section 3553(a) directs the sentencing court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing set out in § 3553(a)(2). Selection of a sentence in accordance with the parsimony provision is guided by the listed purposes and is to be made after consideration of enumerated factors, one of which is the sentencing range set by the Guidelines. The language and the structure of § 3553(a) place these considerations on an even footing, subject to the parsimony provision. The Fourth Circuit's

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mandatory minimum sentences in 21 U.S.C. § 841(b)(1) while using ratios in the drug quantity table lower than 100:1. *See* U.S. Sentencing Comm'n, *Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2007*, 72 Fed. Reg. 28,558, 28,571-73 (2007).

per se rule prohibiting disagreement with the 100:1 ratio runs contrary to the statutory framework. The rule stresses the crack cocaine guideline over the other § 3553(a) considerations, and it incorrectly equates the consideration of unwarranted sentence disparity with a need to pursue uniformity through the Guidelines.

1. The ultimate command of § 3553(a) is that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth" in § 3553(a)(2). Thus, if any one of § 3553(a)'s considerations is to be elevated over others, it is the purposes set forth in (a)(2), for they are also incorporated directly into the parsimony provision. *See also* 18 U.S.C. § 3551 (directing that defendants are to be sentenced "so as to achieve the purposes set forth in subsections (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case").

Aside from that organizing principle, the statute does not require the sentencing court to consider the purposes and other factors set forth in § 3553(a) in any particular order, or to give more weight to the guideline range than to the other factors. *See* 18 U.S.C. § 3553(a) (directing that "[t]he court, in determining the particular sentence to be imposed, shall consider" the factors that follow); *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part) (stating that "[t]he statute provides no order of priority among all th[e] factors"); *United States v. Pickett*, 475 F.3d 1347, 1353 (D.C. Cir. 2007). Instead, the statute sensibly contemplates that a district court will exercise its discretion and weigh the considerations as it deems appropriate in the context of specific cases. If tension arises among the considerations applicable in particular

cases, resolution of that tension is left to the district court, and the appellate court should reverse only if the district court's decision has no reasoned basis to support it. *See Rita*, 127 S. Ct. at 2464 (observing that "different judges (and others) can differ as to how best to reconcile the disparate ends of punishment"); *id.* at 2468 (discussing need for sentencing court to provide statement of reasons).

Section 3553(a) assigns to the sentencing judge, not the court of appeals, the responsibility to balance sentencing purposes alongside other statutory considerations relevant in the particular case when deciding upon the appropriate sentence. *See Rita*, 127 S. Ct. at 2463. In the context of a case involving crack cocaine, a district court not only may, but should, conduct its own evaluation of the 100:1 ratio, and the court of appeals erred in concluding differently.

2. In addition to elevating the Guidelines over other § 3553(a) considerations and the statute's ultimate mandate to impose a parsimonious sentence, the Fourth Circuit misinterpreted § 3553(a)(6), which directs the sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The Fourth Circuit opined that allowing a sentencing court to consider information demonstrating that the 100:1 ratio causes unwarranted disparity would increase, rather than decrease, unwarranted disparity. It speculated that consideration of the fact that the 100:1 ratio results in sentences for crack cocaine defendants that are greater than necessary to satisfy the statutory purposes of sentencing would somehow lead to judges using "their own personal ratio preferences," and that this would

"inevitably result in an unwarranted disparity between similarly situated defendants." *Eura*, 440 F.3d at 633. The Fourth Circuit was wrong on each count.

First, the Fourth Circuit's approach assumes that all offenses involving crack cocaine must be punished identically. But § 3553(a)(6) refers to "similar conduct," not "identical offenses," and to the avoidance of "unwarranted sentence disparities," not to the imposition of "identical sentences." The term "similar conduct" is broad enough to include all drug offenses, and certainly is broad enough to permit a sentencing court to conclude that a defendant convicted of a drug offense involving crack cocaine has been found guilty of conduct similar to that of a defendant convicted of an offense involving powder cocaine. A district court's considered judgment that crack and powder cocaine offenses constitute "similar conduct" is thus just as reasonable as – if not more reasonable than – a court's decision to rigidly adhere to the Guidelines. If two views are each rational, then adopting either one cannot be an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-01 (1990) (discussing deferential review of findings when there are "two permissible views of the evidence"; declared to be "indistinguishable" from abuse of discretion standard), *cited with approval in Koon v. United States*, 518 U.S. 81, 99 (1996); *see also Rita*, 127 S. Ct. at 2471-72.

Second, it is up to the sentencing court to determine, through a reasoned analysis of all the § 3553(a) considerations, whether a sentence different from that suggested by the Guidelines creates a disparity that is warranted or unwarranted. "Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take

into account differences among offenders that are relevant to our purposes and priorities." Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker: *More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. 425, 442 (2006). If different sentences for similar conduct result from a sentencing court's considered application of § 3553(a), that difference cannot be unwarranted. Rather, it simply demonstrates that the statute is operating as designed, with a sentencing court exercising its informed discretion to determine an appropriate sentence in light of the purposes of sentencing as applied in the individual case. Put another way, it cannot be that a provision that seeks to avoid unwarranted disparity may be interpreted to sanction acknowledged unwarranted disparity. The Fourth Circuit's interpretation of § 3553(a)(6) would divorce the text from its very purpose. *See* Brief of Senators Edward M. Kennedy, Orrin G. Hatch, & Dianne Feinstein as *Amici Curiae* in Support of Respondent, at 29, *Claiborne v. United States*, No. 06-5618 ("It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.") (internal citation omitted).

Third, while the Fourth Circuit speculated that judges would use "personal ratio preferences" to recalculate guideline ranges, that did not occur in this case. The district court used the 100:1 ratio to calculate the guideline range; it then proceeded to consider the

information before it and the statutorily identified purposes of sentencing to determine that the guideline sentence was greater than necessary.[9] *Rita* makes clear that this procedure was correct. The sentencing court is to calculate the guideline range using the Sentencing Commission's Guidelines. 127 S. Ct. at 2465. A sentencing court is free, once it has calculated the guideline range, to disagree with the policy reflected therein and reach a sentence other than that suggested by the Guidelines. *See id.* at 2465, 2468. There is no danger of "personal ratio preferences" causing unwarranted disparities, or any valid reason to prohibit sentencing courts from considering the reports of the Commission showing that the 100:1 ratio itself generates unwarranted disparity.

Fourth, the statutory scheme provides assurance that allowing a sentencing court to consider relevant information about the 100:1 ratio will not "inevitably result in [] unwarranted disparity." *Eura*, 440 F.3d at 633.

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[9] In the past, some district courts have revised the 100:1 ratio and used the revised ratio to calculate a new advisory guideline range. This practice may be inconsistent with § 3553(a)(4), but it will not happen following *Rita*, and it did not happen here. Because it did not happen in this case, Mr. Kimbrough's case stands in contrast to others. *See United States v. Pho*, 433 F.3d 53, 58, 59 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 343 (2d Cir. 2006); *United States v. Ricks*, ___ F.3d ___, 2007 WL 2068098, at *1 (3d Cir. 2007); *United States v. Eura*, 440 F.3d 625, 631 n.6 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659); *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007), *petition for cert. filed* June 21, 2007 (U.S. No. 06-12046); *United States v. Jointer*, 457 F.3d 682, 685 (7th Cir. 2006), *petition for cert. filed* Oct. 27, 2006 (U.S. No. 06-7600); *United States v. Spears*, 469 F.3d 1166, 1169 (8th Cir. 2006), *petition for cert. filed* Mar. 2, 2007 (U.S. No. 06-9864); *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) (in dicta, noting that district court cannot substitute its own ratio in place of 100:1 ratio).

The commands of § 3553(a) serve to generally guide district courts' discretion. The parsimony provision places an upper limit on courts' discretion, and § 3553(a)(4)'s requirement that district courts consider the advisory guideline range further focuses that discretion. So, too, do the statutory requirements that the sentencing court impose a sentence that constitutes just punishment in light of the seriousness of the offense, provides sufficient deterrence, sufficiently protects the public, ensures needed treatment in the most effective manner, and promotes respect for the law. In weighing the § 3553(a) considerations and stating its reasons for the sentence imposed, *see* 18 U.S.C. § 3553(c), the sentencing court will explain why a sentence other than that recommended by the Guidelines is, albeit a different sentence, not one reflecting unwarranted disparity.[10]

Finally, even if some differences could result from this process, this Court has recognized that if guidelines-based sentencing is to comply with the Sixth Amendment, strict uniformity must give way. *Booker*, 543 U.S. at 263. District courts cannot violate the command of § 3553(a) to impose a sentence sufficient but not greater than necessary to meet the purposes of sentencing by imposing sentences that are greater than necessary simply to promote uniformity. Put another way, there may now be more

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[10] In any event, in a crack cocaine case, it would appear difficult for a sentencing court to vary to any significant degree from the guideline sentence, although doing so would correct, rather than create, unwarranted disparity. According to the Sentencing Commission's statistics, over 70% of crack offenders will start at base offense levels that are either at the mandatory minimum levels (base offense 26 or 32) or only one level up (base offense level 28 or 34). *See* 2007 Report at 25; U.S.S.G. § 2D1.1(c).

non-guideline sentences, but less true disparity. Hofer, *supra*, at 456-57, 462. The Fourth Circuit erred in concluding otherwise.

3. If Allowed To Stand, The Fourth Circuit's *Per Se* Rule Would Unconstitutionally Constrain The District Courts' Discretion In Crack Cocaine Cases In Violation Of *Booker* And The Sixth Amendment.

Booker is clear: either the Sentencing Guidelines are advisory or they are unconstitutional. The Fourth Circuit has developed a rule of appellate review of sentences in crack cocaine cases – *per se* unreasonableness – that ignores this rule and effectively reinstates the mandatory nature of the guideline applicable to those cases. In other words, by forbidding disagreement with the crack cocaine guideline except in an atypical case, the appellate court has made the guideline mandatory again.[11] The Fourth

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[11] The Fourth Circuit has done this by claiming, on the one hand, that "[not] *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range," while decreeing, on the other hand, that "a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the factors listed in 18 U.S.C. § 3553(a)." *Eura*, 440 F.3d at 634 (emphasis in original). Applying this rule in Mr. Eura's case, the Fourth Circuit found nothing "atypical" to justify a sentence outside the advisory guideline range. *Id.* There is no practical difference between this language and the statutory provision that *Booker* excised in order to render the Guidelines constitutional. *Booker*, 543 U.S. at 245; *see* U.S.S.G. Ch. 1, Pt. A.2 (Nov. 2002 ed.) ("Pursuant to the [SRA], the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents *atypical* features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range.") (emphasis added) (citing 18 U.S.C. § 3553(b)); *see also id.* Ch. 1, Pt. A.4(b) ("The Commission intends the sentencing

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Circuit's rule has thereby reinstated the precise constitutional defect identified by this Court in *Booker*. *See* 543 U.S. at 230-44.

According to the Fourth Circuit, "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." J.A. 98. This rule is so strict that the Fourth Circuit was "constrained to vacate [Mr.] Kimbrough's sentence" even though it acknowledged that the district court's sentence was based only "in part" on disagreement with the applicable guideline range. *Id.* at 97, 98. Such a *per se* standard of review creates a *de facto* mandatory guideline range in violation of the rule announced in *Booker*. *See* 543 U.S. at 234 (recognizing that although in theory, a district court has the ability to depart from the Guidelines, "[i]mportantly, . . . departures are not available in every case, and in fact are unavailable in most"); *see also Rita*, 127 S. Ct. at 2467 (stating that "[e]ven the Government concedes that appellate courts may not presume that every variance from the advisory Guidelines is unreasonable").

If the Fourth Circuit's *per se* rule is allowed to stand, the drug guideline, as applied in crack cocaine cases, must fall as unconstitutional. But this Court has already held that it will avoid such a result by requiring the Guidelines to be treated as advisory, as simply one piece of the overall

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courts to treat each guideline as carving out a 'heartland,' a set of *typical* cases embodying the conduct that each guideline describes. When a court finds an *atypical* case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.") (emphasis added).

statutory sentencing scheme. *Booker*, 543 U.S. at 245-46. The constitutional problem is further avoided by interpreting § 3553(a) to place each of the seven sentencing considerations on an equal footing with one another – in short, to make the Guidelines not merely "effectively advisory," *id.* at 245, but "*truly* advisory." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) (emphasis added); *see also id.* at 2465 (refusing to apply presumption of reasonableness of within-range sentence to district courts' determination of appropriate sentence under § 3553(a) in first instance). Because the Fourth Circuit's *per se* rule of appellate review raises serious constitutional problems by returning sentencing procedures in crack cocaine cases to a pre-*Booker* framework, the doctrine of constitutional avoidance requires that it be rejected. *Jones v. United States*, 526 U.S. 227, 229, 239-40 (1999); *see also INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

4. The Fourth Circuit's *Per Se* Rule Is Inconsistent With The Deference Owed To District Courts' Considered Sentencing Judgments.

Vacating the Fourth Circuit's *per se* reversal will not merely reflect a correct interpretation of the federal statutes and avoid constitutional concerns. It will also reaffirm the deference that this Court and Congress contemplated would be afforded district courts' sentencing judgments under an abuse-of-discretion standard of review. Instead of using the Guidelines as a presumptive benchmark, such review allows the appellate courts to consider each non-guideline sentence on its own terms.

1. Deference to the considered judgment of sentencing courts is a theme that traverses and unites this Court's sentencing jurisprudence. During the pre-Guidelines era of almost unfettered sentencing discretion, this Court explained that "[i]ndisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law is judicial," and that "it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority." *Ex parte United States*, 242 U.S. 27, 41-42 (1916); *see also Williams v. New York*, 337 U.S. 241, 247 (1949) (a sentencing judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been decided").

Neither the Sentencing Reform Act nor the Guidelines were intended to eliminate judicial discretion in sentencing. As stated in the Senate Judiciary Committee report, "[t]he sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decisions on the appropriate sentence." S. Rep. No. 98-225, at 51. Nor was it Congress's intent "that the guidelines be imposed in a mechanistic fashion" that would "eliminate the thoughtful imposition of individualized sentences." *Id.* at 52. Further, although the SRA provided for appellate review of sentences, that review was intended to "follow[] the principle" that a district court's discretion in sentencing "should not be displaced by the discretion of an appellate court." *Id.* at 150.

This Court has repeatedly recognized that Congress intended that district courts retain discretion in sentencing. *Koon v. United States*, 518 U.S. 81, 97 (1996) (observing that Congress "manifest[ed] an intent that district courts retain much of their traditional sentencing discretion"); *see Rita*, 127 S. Ct. at 2472 (Stevens, J., concurring) (recognizing that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence") (internal quotations omitted) (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)). Indeed, Congress recognized "that sentencing has been and should remain 'primarily a judicial function'" when it decided to place the Sentencing Commission within the Judicial Branch of government. *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (citation omitted). Such deference is driven in part by the "institutional advantage" that a district court enjoys in imposing sentences "informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98.

After *Booker* and *Rita*, appellate deference to district courts' sentencing decisions is greater than it was when the Guidelines were mandatory. In *Booker*, the Court struck a portion of the appellate review statute then in effect, 18 U.S.C. § 3742(e), because the excised language "ma[d]e Guidelines sentencing even more mandatory than [before]." *Booker*, 543 U.S. at 261. To replace what it had excised, the Court looked to language that had been in § 3742 as originally enacted by the Sentencing Reform Act. *See id.* (setting out language). As the Court summarized the earlier provision, "the text told appellate courts to determine whether the sentence 'is unreasonable' with

regard to § 3553(a)." *Id.* Further, "[s]ection 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Id.* Thus, not only did *Booker* make the Sentencing Guidelines advisory, it made district courts' sentencing decisions reviewable only for "unreasonableness." *Id.* at 245, 260-61. *Rita* clarified that "appellate 'reasonableness' review merely asks whether the trial court abused its discretion." *Rita*, 127 S. Ct. at 2465; *see Booker*, 543 U.S. at 260, 262 (citing earlier cases employing abuse of discretion standard).

Under the deferential abuse of discretion standard, the considered judgment of a district court that is based on reliable information relevant to the sentence imposed should not be subject to reversal. *See Rita*, 127 at 2468-69; 18 U.S.C. § 3661; 21 U.S.C. § 850. Appellate review does not permit reversal simply because the court of appeals would have imposed a different sentence. *See, e.g., Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring) ("Although I would have imposed a lower sentence had I been the District Judge, I agree that he did not abuse his discretion in making the particular decision that he did.").[12] The Fourth Circuit's *per se* prohibition fails to accord the

[12] This is not to say that a district court's discretion is unlimited. To the contrary, a district court would abuse its discretion if it used information that was not reliable or that was not relevant to its sentencing determination, such as a defendant's allegiance to a particular baseball team. *See Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring); *id.* at 2483 n.6 (Scalia, J., concurring). Also, as *Rita* directs, "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 2468.

deference this Court's precedents require. The Fourth Circuit's rule improperly elevates its own view of sentencing preferences (application of the Guidelines and uniformity as measured by the Guidelines) at the expense of the considered judgment of a sentencing court. Because the *per se* rule is contrary to statute and precedent, it cannot be sustained.

2. The Fourth Circuit's rule conflicts with *Booker* in another way as well. It distorts reasonableness review by tying appellate review of sentences directly to the applicable guideline range. Rather than asking whether the *sentence* is reasonable, as this Court contemplated in *Booker*, 543 U.S. at 260-61, it effectively asks whether the *departure* or *variance* is reasonable. *See* J.A. 98. The court of appeals's rule thereby establishes the baseline for reasonableness as the guideline range, and presumes all other sentences to be unreasonable absent additional fact-finding and explanation. This is the manner in which courts of appeals reviewed departures under the mandatory Guidelines, pursuant to the excised 18 U.S.C. § 3742(e) (*de novo* review of, *inter alia*, whether "the sentence departs to an unreasonable degree from the applicable guidelines range"), but it is plainly not the proper standard for assessing whether the sentence as a whole is reasonable. *See Rita*, 127 S. Ct. at 2473-74 (Stevens, J., concurring). That inquiry cannot be tied to the Guidelines range.[13]

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[13] Like the excised provision, subsection (f) of the statute currently in effect provides that a court of appeals shall remand a case for resentencing if it determines that the "the sentence is outside the applicable guideline range and the ... departure is based on an impermissible factor, or is to an unreasonable degree," 18 U.S.C.

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II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN SENTENCING DERRICK KIMBROUGH TO 180 MONTHS IN PRISON AFTER CONSIDERING THE 100:1 RATIO.

The district court considered the factors identified for its consideration under § 3553(a) that were relevant to Mr. Kimbrough's case, it imposed the sentence that it found to meet the parsimony provision, and it gave a reasoned explanation for its decision. Instead of deferring to the district court, the Fourth Circuit reversed the sentence as *per se* unreasonable because the district court concluded that a sentence premised on the 100:1 powder/crack ratio incorporated in the Sentencing Guidelines was greater than necessary under § 3553(a). The appellate court should not have reversed the sentence as the district court acted well within its discretion in sentencing Mr. Kimbrough as it did.

A. The District Court Was Within Its Discretion In Considering The Sentencing Commission's Reports Because They Were Both Reliable And Relevant To The Court's Sentencing Decision.

In sentencing Mr. Kimbrough, the district court appropriately exercised its discretion to consider the reports prepared by the Sentencing Commission in regard

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§ 3742(f)(2), although the "degree" of departure is not explicitly tied to the guideline range in subsection (f)(2), as it is in subsection (e)(3)(C). This provision, like the excised provisions of subsection (e), assumes that the Guidelines are mandatory and, as Justice Scalia noted in *Rita*, can no longer be considered valid. 127 S. Ct. at 2483-84 (Scalia, J., concurring).

to the 100:1 ratio for two reasons. First, the information was authoritative and reliable. Second, the research and recommendations contained in the reports informed several of the § 3553(a) factors that the district court was required to consider.

1. The Commission's reports are both authoritative and reliable. Congress delegated substantial authority to the Commission to set sentencing policy in accordance with the purposes of sentencing enacted in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. §§ 991(b)(1), 994(c), (f). The reports at issue are statutorily authorized. 28 U.S.C. § 995(a)(20); *see id.* § 995(a)(12)-(16). Because Congress created the Commission to act as an expert body on sentencing matters, its reports can be particularly relevant and useful to district courts at sentencing. *See Mistretta v. United States*, 488 U.S. 361, 379 (1989) (stating that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate"). And the Commission's expertise enhances the likelihood that the reports will be reliable. The reports considered in this case were issued over the course of twelve years after extended review of a great deal of research, and they consistently reached the same conclusions.

2. The Commission's reports are also relevant. They illuminate, for example, the district courts' consideration of the advisory sentencing range because they demonstrate that the Sentencing Commission has reconsidered its own guideline and has forthrightly stated that the advisory ranges in crack cocaine cases are too high. *See* 18 U.S.C. § 3553(a)(4).

The reports also demonstrate that rigid application of the 100:1 ratio within the drug guideline fails to meet the purposes of sentencing in several ways. *See* 18 U.S.C. § 3553(a)(2). First, unyielding application of the 100:1 ratio does not appropriately reflect the seriousness of the offense or the needs for deterrence or incapacitation because the ratio overstates the culpability of crack defendants generally. In 1986, when Congress instituted the 100:1 ratio for statutory mandatory minimums, one of the primary reasons offered for the differential was an assumption that high levels of violence were associated with crack cocaine trafficking; likewise, it was widely assumed that many crack cocaine offenses involved distribution to minors or pregnant women. These assumptions, however, have proven unfounded. *See, e.g.*, 2002 Report at vi, vii, 91, 94-96. Thus, application of the 100:1 ratio punishes crack cocaine defendants for circumstances that are not present in most cases. *See id.* at 95-96. And in the cases where the circumstances *are* present, application of the 100:1 ratio results in double-counting because those defendants will be punished for those circumstances both as they are reflected in the base offense level under the drug guideline and in the application of additional upward adjustments. *E.g.*, U.S.S.G. § 2D1.1(b)(1) (two-level increase for possession of weapon); *see* 18 U.S.C. § 3553(a)(4). Punishment that reaches beyond the crime committed overstates the seriousness of the offense, as well as the need for incapacitation and deterrence.

Nor is respect for the law engendered when punishment misses its target. The Commission's reports establish that while the five- and ten-year mandatory minimum penalties were created to apply to "serious" and

"major" traffickers, in fact, the majority of crack cocaine defendants are smaller-scale, street-level dealers like Mr. Kimbrough. 2002 Report at vi-vii, 5-9, 99. That is, the 100:1 ratio disproportionately impacts far more low-level traffickers than it does the intended targets of the ratio – the mid- and high-level traffickers who distribute the powder that is turned into crack.

Finally, punishment that disproportionately affects minorities undermines respect for the law. An unintended consequence of the ratio's impact on street-level crack cocaine dealers has been that longer sentences are imposed disproportionately on minorities, and in particular, African-Americans, because they make up the great majority of federal crack cocaine defendants. *See* 1995 Report at 156, 161; 2002 Report at 34-35, 62, 102-03. As the Sentencing Commission has concluded, "The 100-to-1 . . . ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants." 1995 Report at 163; *see* 2002 Report at 102-03. Even though the drug guideline is not designed deliberately to sentence minorities more harshly, the fact remains that in practice it does when crack cocaine cases are at issue. The practice of meting out punishment that is harsher to one group than another corrodes belief in equal justice under the law. *See* 2002 Report at 103.

For all these reasons, the district court was permitted to, and properly did, consider the Commission's reports in performing its required tasks under § 3553(a).

B. The District Court Did Not Abuse Its Discretion In Imposing A Sentence Of 180 Months.

The Commission's reports and their impact on the § 3553(a) factors warranted a sentence below that called for by the advisory Guidelines. The district court did not, however, rest its sentence only upon its consideration of the Commission's reports describing the problems with the 100:1 ratio. Rather, after considering the arguments of counsel, the court considered all of the relevant sentencing purposes and factors in § 3553(a), and linked them to the evidence and information before it. *See Rita*, 127 S. Ct. at 2465, 2468-69.

The court considered the nature and circumstances of the offense, noting that it involved powder cocaine as well as crack cocaine. J.A. 72; 18 U.S.C. § 3553(a)(1). The court considered Mr. Kimbrough's history and characteristics, observing that he had never been convicted of a felony or served any time in prison and that his criminal record consisted only of traffic and small-time drug offenses. *Id.* at 73; *see* Sealed J.A. 137; 18 U.S.C. § 3553(a)(1). The court also considered Mr. Kimbrough's steady work history and his honorable military service. J.A. 73-74. Further, the district court considered the types of sentences available when it recognized that it was bound by the mandatory minimums set forth in 21 U.S.C. § 841(b)(1)(A) and 18 U.S.C. § 924(c). J.A. 74-75; *see* 18 U.S.C. § 3553(a)(3). Finally, the district court appropriately considered whether imposition of the sentence suggested by the advisory Guidelines would create "unwarranted sentence disparities among defendants with similar records who

have been found guilty of similar conduct" in light of the 100:1 ratio.[14] J.A. 72, 74; *see* 18 U.S.C. § 3553(a)(6).

After discussing the relevant considerations in § 3553(a) in light of the information in the presentence report about Mr. Kimbrough and the offense along with the § 3553(a) considerations the Guidelines do not take into account, the court reiterated that, "should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." J.A. 74; *see* J.A. 72-74. Finally, in imposing a sentence of 180 months upon Mr. Kimbrough, the court observed, "That's 15 years, which is clearly long enough under the circumstances." J.A. 74; *cf.* 18 U.S.C. § 3553(a) (sentence to be sufficient but not greater than necessary).

In sum, the district court applied the correct legal standard for measuring the length of sentence to impose upon Mr. Kimbrough, considered both the advisory guideline range and the other § 3553(a) factors and purposes of sentencing, and explained its reasons for imposing the sentence that it did. That sentence fell within the statutorily prescribed range. Accordingly, the sentence imposed by the district court was reasonable. The Fourth Circuit should have deferred to the district court's judgment.

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[14] Because this case does not raise any issue as to restitution, the district court committed no error by not addressing the final consideration included in § 3553(a). *See* 18 U.S.C. § 3553(a)(7).

CONCLUSION

For the above-stated reasons, the Court should reverse the decision of the Fourth Circuit with instructions to affirm the judgment of the district court.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines -

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement -

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.[2] -

(1) In General. - Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a

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[1] So in original. The period probably should be a semicolon.

[2] This provision was excised by *United States v. Booker*, 543 U.S. 220, 245 (2005).

kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

* * *

(c) Statement of reasons for imposing a sentence. - The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence -

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in

camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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18 U.S.C. § 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

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[3] So in original. The second comma probably should not appear.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a

detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such

term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving -

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances

referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of

such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved

drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any

person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

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21 U.S.C. § 850. Information for sentencing

Except as otherwise provided in this subchapter or section 242(a) of title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

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28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more

than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to -

(1) establish sentencing policies and practices for the Federal criminal justice system that -

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

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28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System -

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including -

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of -

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b) (1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each

category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[4] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance -

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

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[4] So in original. Probably should be "incidence."

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[5] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance -

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

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[5] So in original. Probably should be "incidence."

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might

become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and -

(1) has been convicted of a felony that is -

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is -

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant -

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect -

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of -

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is

consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect,

including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including -

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such

defendant, on the basis of changed circumstances unrelated to the defendant, including changes in -

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) (1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information

regarding factors made relevant by the guidelines. The report shall also include –

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted

the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.